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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. [redacted] 59

CARL ALDO MARZANI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 816

CARL ALDO MARZANI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Carl Aldo Marzani, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, affirming the judgment of the United States District Court for the District of Columbia, adjudging the petitioner guilty after conviction and imposing sentence, under the False Claims Act, 48 Stat. 996 (1934), 52 Stat. 197 (1938), Criminal Code, Sec. 35 A, U. S. C., Title 18, Sec. 80.

Opinions Below

The opinion of the Court of Appeals, dated February 2, 1948, appears at R. 272 and is reported at — F. (2d) —. Its opinion, dated April 22, 1948, denying petition for rehearing, appears at R. 292 and is reported at — F. (2d) —. The opinion of the District Court, dated April 25, 1947, denying the motion to dismiss the indictment, appears at R. 20 and is reported at 71 Fed. Supp. 615.

Jurisdiction

The judgment of the Court of Appeals was entered February 2, 1948 (R. 282). A petition for rehearing was denied on April 22, 1948 (R. 294). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Section 347 (a)) and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

Statutes Involved

The relevant provisions of the statutes involved are set forth in the Appendix, *infra*, p. 36.

Questions Presented

Defendant was convicted of eleven separate criminal violations of the False Claims Act. The Court below held that the prosecution on the first nine counts of the indictment was barred by the statute of limitations but affirmed the judgment of the District Court on the ground that the sentence, which was general, could be sustained on the remaining two counts, which it held good. The following principal questions are raised by the opinions:

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1. Can the False Claims Act be validly applied, consistently with the protection of petitioner's rights secured by the Fifth and Sixth Amendments to the Constitution and with the decision of this Court in *United States* v. *Gilliland*, 312 U. S. 86 (1941), to a prosecution for false statements by one government employee to another in the same government department, in a private discussion held pursuant to no law, rule or regulation, but initiated solely at defendant's request for the purpose of asking his superior in the department why defendant had been asked to resign, where such statements were not under oath, not witnessed, not stenographically transcribed, never reduced to writing, and not required to be made, where the only two participants in the conference addressed each other throughout by their first names and discussed a wide variety of other topics, where no suitable notice was given by regulation or otherwise of the consequences of knowingly and wilfully making any false or fraudulent statements and where the statute makes punishable such statements under no more definite or ascertainable standards of guilt than that they be made "in any matter within the jurisdiction of any department or agency of the United States"?

2. Was the petitioner deprived of his rights to due process and a fair trial under the Fifth and Sixth Amendments to the Constitution, and substantially prejudiced within the meaning of the applicable rule,[1] statute[2] and decision of this Court in *Kotteakos* v. *United States*, 328 U. S. 750 (1946) by reason of the inclusion of the nine barred counts as issues upon the trial, the submission of those counts to

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[1] Fed. R. Crim. P., 52 (a).

[2] Sec. 269 of the Judicial Code, as amended, 40 Stat. 1181 (1919), 28 U.S.C.A. § 391 (1928).

the jury and the admission of evidence relating to those counts, in a trial which, the court below held, could validly involve only the remaining two counts, where (1) the nine barred counts contained irrelevant, prejudicial and inflammatory matter, (2) the evidence admitted under those counts established proof of nine separate crimes under the False Claims Act and other crimes under other Federal and State laws, (3) such proof was not admissible on the issue of intent and (4) in any event, the trial court did not instruct the jury as to the purpose for which such proof should be considered?

3. Was petitioner deprived of his rights under the Fifth Amendment to the Constitution by reason of the holding of the court below that the general sentence of one to three years imprisonment, imposed by the trial court, upon a verdict of guilty as to each of eleven separate counts, must be sustained, although nine of the counts were held on appeal to have been barred by the statute of limitations, the holding is based solely on the presumption that the trial court imposed the same sentence for two violations of the statute that it would have imposed for eleven violations which included those two, and it is impossible to determine from the record what part of the sentence is attributable to the conviction on the barred counts, the remaining counts or any of the counts separately?

4. Was petitioner deprived of liberty without due process of law and the right to an impartial jury trial by a representative jury, in contravention of his rights under the Fifth and Sixth Amendments, by reason of the application by the trial court of a unique test for the admissibility of evidence, based on the presence of nine Negroes on the jury, rather than a general standard applicable to any representative

jury, and is the exercise of the supervisory power of this Court over the Courts of the District of Columbia properly invoked to correct the application of such a test?

Petitioner assigns as error by the court below the affirmative answer to the first and the negative answers to the second, third and fourth of the foregoing questions.

Summary Statement of Matters Involved

On January 17, 1947, petitioner was indicted in eleven counts for having made false and fraudulent statements in matters within the jurisdiction of departments and agencies of the United States in violation of the False Claims Act (R. 2-19).

The first nine counts of the indictment charged that the defendant, while employed by the Federal government, and in the course of authorized investigations as to his character and fitness, falsely stated to representatives of the Federal Bureau of Investigation in 1942 and to representatives of the Civil Service Commission in 1942 and 1943 that he had never been a member of, never attended meetings of, never contributed services to, and never participated in the activities of the Communist Party, never used the name Tony Whales, and never made any speeches against conscription. The falsity of each of these statements is specified in numerous and detailed particulars in certain of the counts. The remaining two counts charged that in 1946 defendant, while so employed and in such an authorized investigation, falsely stated to a representative of the State Department that he had never been a member of the Communist Party and had never used the name Tony Whales. In these counts, a single specification of falsity

is alleged as to each statement. For convenience, the indictment is summarized in the footnote.[2]

Before, during and at the close of the trial, defendant moved to dismiss the first nine counts as barred by the

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[2]

Count	Date of Statement	Nature of Statement	Statement Made to Representative of	Number of Specifications As to Falsity	Defendant Employed by
1.	July 29, 1942	Never a member of Communist Party	F. B. I.	1	O.S.S.
2.	July 29, 1942	Never attended meetings of Communist Party	F. B. I.	13	O.S.S.
3.	July 29, 1942	Never contributed services to Communist Party	F. B. I.	11	O.S.S.
4.	July 29, 1942	Never participated in activities of Communist Party	F. B. I.	11	O.S.S.
5.	Nov. 23, 1942	Never used the name Tony Whales	Civil Service Commission	1	O.S.S.
6.	Nov. 23, 1942	Never a member of Communist Party	Civil Service Commission	1	O.S.S.
7.	Nov. 23, 1942	Never made any speeches against conscription	Civil Service Commission	2	O.S.S.
8.	Apr. 20, 1943	Never used the name Tony Whales	Board of Appeals and Review of the Civil Service Commission	1	O.S.S.
9.	Apr. 20, 1943	Never made any speeches against conscription	Board of Appeals and Review of the Civil Service Commission	1	O.S.S.
10.	June 1, 1946	Never a member of Communist Party	State Department	1	State Dep't
11.	June 1, 1946	Never used the name Tony Whales	State Department	1	State Dep't

statute of limitations (R. 20, 31, 46). Defendant's motions having been denied by the trial court, the case was tried on all eleven counts, defendant was found guilty on each count, and the court sentenced him generally to one to three years imprisonment on all eleven counts (R. 47).

Defendant's Statements: In 1942, defendant came to Washington and was employed by the Federal government in the Office of the Coordinator of Information and later in the Office of Strategic Services as a war service appointee, subject to a character and fitness examination. In the course of that examination, he was formally interrogated in 1942 by representatives of the F.B.I. and of the Civil Service Commission, and stated under oath that he was not and had never been a member of the Communist Party and that he had never attended its meetings, participated in its activities, contributed services to it, used the name Tony Whales or spoken against conscription (Tr. 103-109, R. 244-247).[4] He was, nevertheless, rated ineligible for further responsible government employment. He appealed to the Board of Appeals and Review of the Commission in April, 1943, and in sworn testimony in a formal hearing before that Board, again stated that he had never used the name Tony Whales and had never made any speeches against conscription (Tr. 213, 215-216; R. 249-254). That Board reversed the previous ruling and rated him eligible (Tr. 334-335). He continued as a civilian employee of the O.S.S. until inducted into the Army as a private. He was then reassigned, in military status, to his former position in the O.S.S. and after overseas service, was honorably discharged as a master sergeant (R. 173, 175). He remained in the employ of the O.S.S. and later of the State Department, to

[4] The reference "Tr." is to the original transcript of record certified to this Court by the court below. The original exhibits are referred to as "Defendant's Exhibit" or "Government Exhibit".

which his O.S.S. unit had been transferred. Having been requested, on April 20, 1946, to resign for security reasons, he sought an appointment with Panuch, Deputy Assistant Secretary for Administration, his superior in the State Department, to ask an explanation, and to state his desire to resign but unwillingness to do so under fire (R. 178). At the ensuing meeting on June 1, 1946, between Panuch and defendant, which was private and informal, defendant again stated that he had never been a member of the Communist Party and had never used the name Tony Whales (R. 48-55). Thereafter, upon apparent assurances that his record was clear, defendant resigned and entered private employment as a producer of films for labor unions (R. 59, 176-181, 202). After his resignation, he was notified that he had been discharged from the State Department in the interest of the United States. (Defendant's Exhibit No. 1, Government's Exhibit 35, Tr. 286, 360).

Proof of the Falsity of Defendant's Statements: The government introduced proof that during 1940-1941 when defendant lived on the lower East Side of New York and worked as an economics instructor at New York University, he was a member, organizer and educational director of a section or branch of the Communist Party; used the alias Tony Whales, attended numerous public and private meetings of the Party; conducted study classes for it; spoke, under its auspices, against the Smith-Connally Bill, the Selective Service Bill, and other legislation; gave lectures on the principles of communism; advocated opposition to the entry of the United States into the war and the abolition of discrimination and segregation against Negroes; was active in promoting a branch of the National Negro Congress on the lower East Side; and performed such other services, and engaged in such other activities for the Party as collecting membership books and distributing tickets to a

Soviet movie then showing in New York City (R. 257-258, 260; 71-74, 76, 82, 94-117, 121-122, 156-242).

Several matters arising from the conduct of the trial and the holdings of the court below require further statement to explain the basis in the record for the questions here presented. These matters are as follows:

The interview with Panuch: The government concedes that defendant requested the interview; that he met and conferred "privately" with Panuch; that the statements were not under oath and not stenographically transcribed.[5] It is undisputed that there were only two participants in the discussion, one the superior of the other in office (R. 48); that they addressed each other by their first names throughout and were on "quite a good personal relationship" with each other (R. 49, 176); that they discussed a wide variety of topics other than the charges and defendant's statements with respect to the charges in a long conference lasting "over two hours . . . in which we just threshed the matter out thoroughly" (R. 52); that Panuch had never heard of the proceedings before the Civil Service Commission, or the F.B.I., until defendant told him about them at the interview (R. 51); and that the interview was not preceded by any notice of charges or regulated by any law or rule of the Civil Service Commission, or otherwise, defining obligations or establishing procedural safeguards, and was never reduced to writing (R. 293, 55, 176). There is nothing in the record to show that this private, informal, unregulated discussion between two government employees in the same government department was on the same level, or could reasonably be thought by the defendant to be of the same nature as the formal interrogations by the F.B.I. and

[5] "On June 1, 1946, pursuant to his request for an interview, defendant met and conferred privately with Mr. Panuch. Defendant was not under oath and the proceedings were not transcribed." (Brief for Appellee, p. 3.) (R. 47-55).

the Commission in 1942 and 1943, or the hearing before the Board of Appeals and Review of the Commission in 1943, or had risen to the dignity of a "matter within the jurisdiction of the United States", as required by the statute.

The court below, however, without adverting to the absence of pertinent regulations, or other safeguards, held that the False Claims Act was applicable to false statements made under these circumstances because defendant was engaged in "official" discussions with his superior (R. 293). For reasons stated below this holding is assigned as error.

The evidence admitted under the nine barred counts of other crimes and prejudicial matter for which defendant was not validly on trial in the last two counts:

1. The government's case as to the falsity of all of defendant's statements was limited to evidence of defendant's activities in 1940-1941 in New York City. Included in such evidence was testimony tending to establish that defendant was guilty of violations of the New York Anarchy Act (New York Penal Laws, Secs. 160-166, *Gitlow* v. *New York*, 268 U. S. 652 (1925)), the Seditious Conspiracy Act (35 Stat. 1089, U. S. C. Title 18, Section 6 (1909)), and the Alien Registration Act, 1940 (54 Stat. 670 U. S. C. Title 18, Secs. 9-17 (1940)), in that defendant advocated, to a meeting sponsored by the National Negro Congress, a Communist revolution in the United States "now" (R. 116) and urged fellow-Communists that "the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the armed forces in order that the Communists may take over . . . overthrow the capitalists and also take over control of the Army"(R. 104). Such evidence was admitted under the specific allegations of Counts III (k) and IV (k) which allege such advocacy as proof of the falsity of defendant's general statements to the F.B.I. in 1942 that he had never contributed services to or participated in the activities of the Communist Party (R. 5-9).

2. Also included in the evidence of defendant's activities in 1940-1941 was testimony that defendant had counselled and instructed Party members to infiltrate the National Negro Congress for the purpose of creating a Communist front organization and to sow resentment and discontent among Negroes by agitating questions of racial discrimination in order to recruit Party members (R. 74-78, 106-107, 112-113, 115-117, cf. 66-67, 70) admitted under Counts III and IV (e) and (h) (R. 5-9). In its effect upon the jury, such evidence is as prejudicial as the proof of other crimes. Defendant contended to the court below that both the proof of other crimes, under other federal and state laws, and the evidence, cited above, in the nature of crimes, were irrelevant and prejudicial on a trial of the last two counts.

The court below rejected defendant's contentions on both scores, and held that the evidence under these counts was admissible on the trial of the last two counts because such evidence was "consistent with (the) policies" of the Communist Party and therefore relevant upon the disputed issue of defendant's membership in the Communist Party under Count X (R. 277). There is no evidence whatsoever in this record as to the official advocacy by the Communist Party of revolution "now" or the sowing of resentment and discontent among Negroes. For reasons stated below, defendant assigns this holding as error.

3. To support each of the nine crimes charged in the first nine counts, the government introduced, as a part of its case in chief, documentary evidence of defendant's sworn statements to the representatives of the F. B. I. in 1942 and of the Commission in 1942 and 1943 (R. 244-254), identified by the stenographers who transcribed such statements and by the investigators who conducted the interrogations. (Tr. 109-111, 116; 120, 125-126; 152, 154; 194-195; 210, 216, 217-220; 227-228).

That these nine statements constituted an indispensable part of the proof of nine crimes, each separate and distinct from the other, is clear beyond cavil. The trial court ruled that the statements were separate (R. 25-26). For having knowingly, wilfully and falsely made them, defendant was convicted of nine separate crimes.

It is equally clear that, on that issue of defendant's knowledge and wilfulness, these nine statements which were sworn, documented and formal, must necessarily have had a decisive effect upon the jury in its consideration of the two later statements to Panuch, which were unsworn, oral and informal.

Defendant, therefore, contended, in the court below, that the admission of these nine statements, if prosecution thereon was barred, substantially prejudiced defendant's rights in the trial of the statements in the last two counts.

The court below, however, rejected this contention, holding that the error did not prejudice defendant in a trial which could validly involve only the last two counts, because the nine earlier statements were the same or similar to the statements in the last two counts, the issue submitted to the jury on the trial of eleven counts was the same as it would have been if only the last two counts had been submitted, and the nine statements were beneficial to defendant, rather than than prejudicial, in that they showed that from a time close to the event, defendant had consistently and undeviatingly maintained the same position (R. 277-278. For reasons stated below, defendant assigns this holding as error.

The trial court's failure to treat the predominantly Negro jury as a representative jury and the resulting exclusion of relevant evidence considered too prejudicial for this jury to consider: The government's case as to the falsity of defendant's statements was introduced through three witnesses (Hewitt, Harper, Drew) who were Negroes. The subject

matter of their testimony concerned in substantial part their own and defendant's activities in connection with a branch of the National Negro Congress on the lower East Side in New York City in 1941 and 1942. Nine members of the jury who heard the case were Negroes. Defendant is white. (R. 70 et seq., 105 et seq., 254-255). These facts are not denied.

The effect of this combination of circumstances on the trial court's rulings is illustrated by the following three examples:

Harper testified that he had attended a Communist meeting at defendant's home (R. 71-74, 76, 82). Defendant sought to testify that the meeting was not a Communist meeting, and to identify the time and subject matter of the meeting by reference to an incident involving police brutality against two Negroes (R. 185-186). The trial court halted the testimony and, in conference at the bench, held that the reference by defendant to police brutality against Negroes had "other purposes," that "the prejudice has happened here" and that defendant was significantly making use of such testimony to prejudice the jury (R. 186-189). Counsel for the government stated that "there could be no fair trial before *this* jury, if you go into the beatings" (R. 188, italics supplied) and announced the government's intention to move for a mistrial if the testimony persisted. The trial court thereupon limited defendant's direct examination to avoid specific references to thes incident of police brutality against Negroes (R. 188).

Drew, a member of the New York City Police Department, testified on direct examination that pursuant to official instructions, he had joined the Communist Party on the lower East Side as an undercover police agent, under a false name and with fictitious identifications, and met and dealt with defendant as fellow Communist (R. 88-90, 92-117,

120-122). Included in Drew's direct examination and in the examination of his superior officer in the Police Department, were references to the fact that Drew had been assigned to investigate the National Negro Congress (R. 64-67, 70, 106) but that finding no branch of this organization on the lower East Side, he had created such a branch, solicited members for it, chaired its meetings, written pamphlets for it, become the head of it, and simultaneously reported on the activities of the organization and its members to the Police Department (R. 89-91, 106, 112-114, 117). Some of this testimony referred to events at which defendant was not asserted to be present. Defendant sought to cross examine as to these activities for the purpose of impeaching Drew's credibility and establishing his duplicity as an *agent provocateur*. The trial court halted such cross examination, limited it to meetings where both Drew and defendant were present, about which there had been testimony and forbade certain questions altogether (R. 123-126, 105).

Harper, as well as Drew, testified about defendant's activities on behalf of the National Negro Congress (R. 74-76, 83-84, 86, Tr. 458). Defendant sought to cross examine both Harper and Drew as to the objects of the National Negro Congress. The trial court refused to permit such cross-examination (R. 79-81).

The trial court explained his reasons for this limitation of evidence in extended colloquies at the bench (R. 79-81, 123-126, 186-189). His remark to counsel for defendant that the testimony of defendant with respect to the incident involving police brutality, which was directly in conflict with the testimony of Harper, had the "other purpose" of prejudicing the jury and, in fact, did prejudice it, is clearly the rationale for his earlier rulings limiting Drew's cross-examination and his refusal to go into "this National (Negro) Congress," on the cross examination of Drew and

Harper, although offered as to subject matter about which these witnesses had testified on direct.

Defendant contended in the court below that the trial court unproperly excluded this relevant and important evidence solely because of its apprehension that the predominantly Negro jury could not consider the evidence on the same terms that any other representative jury would have considered it and that thereby defendant was unconstitutionally deprived of a fair trial before a representative jury.[6]

The court below rejected defendant's contentions on the ground that defendant's examination with respect to the incident of police brutality "was allowed to proceed without interruption" (R. 279) although specific reference to the incident was forbidden by the trial court as prejudicial; that "full opportunity was given to explore the testimony (of Drew) given on direct" (R. 279), although the record unequivocally demonstrates otherwise (R. 123-126, 105; cf. 89-91, 106, 112-114, 117), that such limitations as were imposed on the testimony of Drew had to do with "the testing of his credibility by inquiring into matters not included in direct examination (R. 279)," although again the record demonstrates otherwise, (R. 123-126, 105; cf. 89-91, 106, 112-114, 117) and were a proper exercise of the trial court's discretion, because Drew's activities as an *agent*

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[6] The government has, at least inferentially, conceded that the trial court took into consideration in its rulings the predominantly Negro composition of the jury. In its brief in the court below, it stated "As respects the evidence under discussion, the court, in one sense, may have justifiably given a measure of consideration to the fact that there were Negroes on the jury. The merit in the government's objection that the evidence was collateral, self-serving and therefore prejudicial, being obvious—it would have been no more than natural for the court to have considered how much greater that prejudice would be, with Negroes on the jury, in view of the very nature of the evidence sought to be introduced by appellant concerning his activities 'on behalf of' that race". (Brief for Appellee, p. 65).

provocateur were collateral to the issues in the case (R. 280); that "full *argument* as to Drew's role was available to appellant upon th attestimony,"[7] (R. 280) presumably in substitution for the right of cross-examination; and that the refusal to permit examination into the "organization, aims and desires of this (National Negro) Congress" was proper because irrelevant to the issue in the case of the truth or falsity of defendant's statements (R. 280). For these reasons, the court below held that while the trial court imposed restrictions on the right of cross examination, the restrictions were not undue, were not based upon its failure to treat the predominantly Negro jury as a representative jury, and would have been the same regardless of the racial composition of the jury (R. 280). For reasons stated below, defendant assigns these holdings as error.

Reasons for Granting the Writ

1. *The False Claims Act, as applied in the trial of the only timely two counts of the indictment, deprived defendant of his rights under the Fifth and Sixth Amendments to the Constitution.*

The court below held that the False Claims Act was constitutionally applicable in the trial of the last two counts in this case, to make criminal false statements uttered in a private, informal, and unregulated discussion between two government employees in the same department, on the ground that the discussion was, nevertheless, "official." In so holding, the court has decided in a novel manner a question of general importance relating to the construction and application of the Constitution and a federal statute. This holding far transcends the interest of the government and the defendant in this particular case, and reaches into the daily relations of millions of government employees with

[7] Italics supplied.

each other, and of persons generally in their dealings with the government, with ultimate effect upon the entire character of the government service.

Even on the narrow ground of the particular facts of this case, where the false statements were alleged to have been in an official discussion concerning defendant's resignation which had been requested for security reasons, the decision is of far-reaching application. The President's Loyalty Order of March 21, 1947 [8] involves a loyalty investigation of approximately 2,000,000 [9] government employees, plus all applicants for federal employment.[10] At the outset, it was estimated that the program would require investigations in 135,000 existing cases.[11] If, in the course of these investigations, any federal employee makes false statements in discussing charges of disloyalty against him with his superior in office, in the kind of private, informal, unregulated conversation that occurred in this case between defendant and Panuch, the False Claims Act is applicable, under the decision of the court below, and the employee is subject to fine and imprisonment. The Loyalty Order and the regulations [12] of the Loyalty Review Board, established pursuant

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[8] Executive Order 9835, 12 Fed. Reg. 1935 (1947).

[9] Statement of Seth W. Richardson, Chairman, Loyalty Review Board, U. S. Civil Service Commission, Press Release, Dec. 23, 1947, p. 2.

[10] *The Report of the President's Temporary Commission on Employee Loyalty*, dated November 25, 1946, states that during the period July 1, 1941 to December 31, 1946, the Civil Service Commission investigated 392,889 cases covering qualifications, character and loyalty, or 12.2 per cent, of the total of 9,604,935 placements in government service during the period. The Report shows 868,443 placements during 1946 and 119,624 placements for a six months period in 1947. U. S. Civil Service Commission, Press Release, November 25, 1946, pp. 17-19.

[11] Hearings before House Subcommittee on Appropriations on Supplemental Appropriations Bill for 1948, 80th Congress, 1st Sess. 38 (1947) pp. 8, 33. See O'Brien, *Loyalty Tests and Guilt by Association* (1948) 61 Harvard Law Review, 592, 607.

[12] 13 Fed. Reg. 256 (1948) See also, Statement of Seth W. Richardson, Chairman, Loyalty Review Board, U. S. Civil Service Comm'n, Press Release, Dec. 23, 1947.

to the Order, rightly require that with respect to the far lesser punishment of removal from office on the ground of disloyalty, the employee should be entitled to far greater protection. Thus, the directives to employing agencies issued by the Loyalty Review Board, established pursuant to Executive Order 9835, require that the employee charged with disloyalty shall be served a notice in writing at least thirty days in advance of the proposed removal, giving the employee the following information: a statement of the charges against him in factual detail; his right to answer the charges in writing, under oath or affirmation, within a specified reasonable period of time; his right to have an administrative hearing before a loyalty board in the agency, upon his request; his right to appear before such board personally, to be represented by counsel of his own choosing and to present evidence in his own behalf; and the authority (executive order and statute, if applicable) under which the notice is being sent. A further directive of the Board requires that "the hearings before the boards shall be conducted in an orderly manner and in a serious business-like atmosphere of dignity and decorum. . . . Testimony shall be taken under oath or affirmation (and) shall be recorded and transcribed and made a permanent part of the record in the case. . . . Wherever possible the testimony shall be taken verbatim and transcribed, (otherwise by) suitable notes . . . which shall be summarized and agreed to by all parties."[13] It will be noted that substantially all of the safeguards provided by these regulations were entirely lacking in the informal discussion which defendant had with Panuch. His statements at that interview were not under oath, not stenographically transcribed, and never reduced to writing; there was no written prior notice of charges, no opportunity to answer in writing, to be repre-

[13] 13 Fed. Reg. 256.

sented by counsel, or to present evidence before a board, no notice of the authority under which the interview was to be conducted and no record or even knowledge by Panuch of the previous interrogations and hearings on the same subject by the F. B. I. and the Commission; the interview was conducted informally on a "Hello Joe—Hello Carl" basis, which hardly comported with "a serious business-like atmosphere of dignity and decorum" or gave defendant suitable notice of the consequences of knowingly and wilfully making any false or fraudulent statements in a matter within the jurisdiction of the United States.

The interview was not in conformity with the applicable provisions of Rule XII [14] and Departmental Circular 222 [15] of the Civil Service Commission which require, at the minimum, written notice of the charges against the employee and a reasonable time for personally answering the same in writing, such documents to be made a part of the records of the department (Tr. 200, Gov't. Exhibits 24, 24A). It was not in conformity with the minimum principles of the Hearing Procedures of the Personnel Security Board of the State Department,[16] effective October 7, 1947. These Procedures require the employee to be served with written prior notice of the hearing; the charges, where possible; his privilege of replying to the charges, of appearing with counsel at a hearing, and of presenting evidence in his own behalf, and entitle him to present sworn testimony, if he so requests, or to refuse to answer any questions, with a stenotypist record to be made of the testimony.

In short, the Panuch interview, which was not a removal proceeding but a discussion about a voluntary resignation,

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[14] Civil Service Act, Rules and Regulations Annotated (1943 ed.) p. 283.

[15] Id. p. 291.

[16] Cf. Dept of State Press Release No. 798 ,Oct. 7, 1947). See also Dept. of State Press Release No. 874, (Nov. 1, 1947) 886 (November 5, 1947) and 960 (December 10, 1947).

was wholly beyond the procedures established by any regulations and lacking in the safeguards intended to be set up by those procedures. In holding that the False Claims Act was constitutionally applicable to the trial of statements made at such a interview, the court below ignored these factors.

The existence of the Regulations of the Loyalty Review Board and of the Hearing Procedures of the State Department, now in effect, does not preclude a repetition of the type of interview which defendant had with Panuch, any more than the existence of the Civil Service Regulations and Circular then in effect precluded the occurrence of that very interview. Indeed, with the present unprecedented increase in loyalty investigations, the number of such informal interviews is also likely to increase. If the decision of the court below is upheld, government employees will converse with their superiors on loyyalty matters at the peril of going to jail, if they make false statements.[17]

The decision of the court below has an even more general importance than in its application of the False Claims Act to false statements with respect to requested resignations on loyalty grounds uttered under the circumstances shown by the trial of counts X and XI. Its holding by necessary implication is that any false statement made by one government employee to another, by any applicant for government employment to a government employee, or by any private person to a government employee on *any* "official" matter is punishable under the statute, although the false statement is made with the same lack of formality, under the same absence of obligation, and pursuant to the same lack of regulations as characterized defendant's statements to

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[17] See Statement of the Attorney General before the House Committee on Un-American Activities, Feb. 5, 1948, Dept. of Justice Press Release, referring to the intention of the Department of Justice to use the False Claims Act in prosecutions of the type of the *Marzani* case. (p. 3)

Panuch. By thus equating "official" to "any matter within the jurisdiction of the United States," the court below has given the False Claims Act a construction, so novel and far-reaching, that the settlement of the question by this court is required.

The constitutional question involved was saved by this Court in passing on the constitutionality of this same statute in *United States* v. *Gilliland*, 312 U. S. 86, 91 (1940) where it held that

> "Nor can the statute be deemed to be invalid because of indefiniteness. The affidavits and reports required had been *sufficiently described* and the *duty enjoined* had been *adequately defined.*"[18]

In that case, the Secretary of the Interior had promulgated regulations under the "Hot Oil" Act, which the President had approved, and a Board was thus set up with which monthly reports were required to be filed on forms approved by the Secretary. This Court stated:

> "Any one presenting the *required* affidavits and reports to the Board set up under the *pertinent regulations* was *suitably charged with notice* of the consequences of knowingly and wilfully including therein any false and fraudulent statements."[19]

The limitations thus applied in the *Gilliland* case conform to the rulings by this Court in a long line of cases that no one may be required at the peril of life, liberty or property, to speculate as to the meaning of penal statutes (*Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939) see *Kline* v. *Frink Dairy*, 274 U. S. 445, 458 (1927); that such statutes must adequately, explicitly and unambiguously inform those subject to its terms what conduct will be considered criminal;

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[18] Italics supplied.

[19] Italics supplied.

(*Kraus & Bros.* v. *United States*, 327 U. S. 614, 621 (1946)); and that every man should be entitled to know with certainty when he is committing a crime (*United States* v. *Reese*, U. S. 92 U. S. 214, (1875)).[20]

No case has been found under the False Claims Act where a false statement was held punishable, unless the matter within the jurisdiction of the United States, as to which the statement was made, was defined by some other law, rule, regulation or proclamation, or the statement was made under circumstances which otherwise gave suitable notice of the criminal consequences involved.[21]

The key words of the statute are "in any matter within the jurisdiction of any agency or department of the United States." Standing alone, unlimited by any regulation or applied under circumstances which do not adequately define the obligation, enjoin the duty, or give suitable notice of criminal consequences, they provide no reasonable standard of guilt and attempt to cover so much that they effectively

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[20] Accord: *Winters* v. *New York*, 333 U. S. 507 (1948); *Musser* v. *Utah* 333 U. S. 95 (1948); *Screws* v. *United States*, 325 U. S. 91, 102 (1944); *Herndon* v. *Lowry* 301 U. S. 242 (1937); *Collins* v. *Kentucky* 234 U. S. 634 (1934); *Smith* v. *Cahoon* 283 U. S. 553 (1931); *Connally* v. *General Construction Co.* 269 U. S. 385 (1936); *Champlin Refining Co.* v. *Corporation Commission* 286 U. S. 210 (1932); *Small Co.* v. *American Sugar Refining Co.* 267 U. S. 233 (1925); *United States* v. *Cohen Grocery Co.* 255 U. S. 81, 89, 92 (1921).

[21] See for example: *United States* v. *Zavala* 139 F. 2d 830 (C. C. A. 2, 1944) (false statements on customs declaration, a matter within jurisdiction of United States by virtue a regulation, executive order and the Trading with the Enemy Act, of which defendant was given prior notice); *United States* v. *Meyer* 140 F. 2d 652 (C. C. A. 2, 1944) (false statements in a formal hearing before an Exclusion Board, established under executive order and regulations with notice to defendant); *United States* v. *Heine* 149 F. 2d 485, *United States* v. *Barra* 149 F. 2d 489 (C. C. A. 2, 1945) (false statements in an application for a "certificate of identification" required by Presidential proclamation and procured in accordance with detailed regulations of Attorney General); *United States* v. *DeLorenzo* 151 F. 2d 122 (C. C. A. 2, 1945) (false statements in an application for Federal employment subject to certification by Civil Service Commission of which defendant was aware).

cover nothing. The record shows that the statute was so applied in the trial of the Counts X and XI herein, thereby depriving defendant of his rights under the Fifth and Sixth Amendments to the Constitution.

2. *Defendant was denied due process and a fair trial and his rights were substantially prejudiced by having been prosecuted, tried and punished for eleven violations, when his trial could lawfully have involved only two violations of the False Claims Act.*

The court below held that the inclusion of the nine barred counts, as issues upon the trial, the submission of those barred counts to the jury, and the admission of evidence relating to those counts did not substantially prejudice defendant in a trial which could validly involve only the remaining two counts. This decision, which construes and applies the Constitution, the False Claims Act and the "Harmless Error" statute, is of general importance in the administration of criminal justice in the federal courts.

The court below based its holdings on two grounds, first that all of the evidence actually introduced at the trial would have been admissible in a trial limited to the last two counts of the indictment; and second, that the issue actually submitted to the jury was in fact the same as it would have been if only the last two counts had been submitted (R. 277-278).

In so holding, we submit, the court below ignored the following prejudicial errors which were, in fact, committed:

A. The first nine counts contain specific allegations of prejudicial matter which are entirely lacking in the remaining two counts. Those two counts merely charge that defendant in 1946 falsely stated that he had never been a member of the Communist Party and had never used the name Tony Whales, whereas he was in fact a member of

the Communist Party in 1940 and 1941 and had in fact used the name Tony Whales in the Communist Party. Apart from the repetition in the first nine counts of the same or similar charges, itself of prejudicial effect in the trial of the last two counts on the issue of knowledge and wilfulness, Counts III and IV charge that defendant falsely stated that he had never contributed any services to or participated in the activities of the Communist Party, whereas he did in fact counsel and advise Communist Party members and recruits "with respect to methods to be employed in infiltrating divers groups and societies for the purpose of creating Communist Front organizations" (Counts III and IV (e)); "to sow resentment and discontent among Negroes by agitating the question of racial discrimination, to the end that members for said Party might be thus recruited" (Counts III and IV (h)); "concerning a plan, policy and program of said Party having for its purpose (1) disintegration of the morale of the Military Forces of the United States; (2) teaching the principles of Communism to men in said Military Forces; and (3) recruiting members for the Communist Party from the ranks of said Military Forces to the end that the Communist Party might gain control thereof and thus bring about a revolt against the Capitalist System." (R. 6-9, 36-38, see also Counts VII and IX, R. 12-13, 15-16, 38-39). Had the trial court dismissed the first nine counts before trial, as the court below now says was required, none of these charges would have been included in the indictment or submitted to the jury. Such charges are so highly prejudicial and defamatory that they constitute civil libel *per se*, as placing the accused "beyond the pale of respectability and making him a symbol of public hatred." *Spanel* v. *Pegler*, 160 F. 2d 619, 622 C. C. A. 7th (1947) (citing cases); *Mencher* v. *Chesley*, 75 ~~(D. C. D. C., June 27, 1947, unreported). Here, the trial~~ N. E. 2d 257 (N. Y. October 16, 1947); the refusal of a wit-

ness before a Grand Jury to answer such charges in the form of questions may be sustained on the basis of the privilege against self incrimination. In re *Costello*, (D. C. D. C., June 27, 1947, unreported). Here, the trial court instructed the jury to consider all the counts of the indictment, quoting verbatim all the prejudicial and inflammatory matters alleged in the first nine counts (R. 36-9, 43). If it is prejudicial and reversible error for the trial court to submit to the jury charges involving the "small dishonesties of trade" which had been abandoned without calling the attention of the jury to the fact of such abandonment (*Nash* v. *United States*, 229 U. S. 373, 379-380 (1912)), it is infinitely more prejudicial for the trial court, as it did here, to submit to the jury charges involving highly inflammatory and prejudicial matters which were not only abandoned in part [22] but were totally barred, under instructions to consider it all.

B. Evidence of other irrelevant crimes was erroneously admitted. The court below held that the evidence admitted under the barred counts relating to defendant's speeches in 1940-41 was consistent with the policies of the Communist Party and therefore admissible under the disputed issue of membership in the party under Count X (R. 277). Such evidence included testimony that defendant had spoken to a meeting sponsored by the National Negro Congress advocating a Communist revolution "now" and, at another time,

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[22] The government contends that Counts III and IV (e) and (h) were abandoned. In its brief in the court below, it stated "Appellant is in error that the government introduced evidence that defendant had counselled and instructed Party members to infiltrate groups and societies, particularly the National Negro Congress, for the purpose of creating Communist front organizations and to sow resentment and discontent among Negroes by agitating the questions of racial discrimination in order to recruit Party members. No such testimony appears in the record." (Brief for Appellee, p. 37.) The trial court did not call the fact of such abandonment to the attention of the jury.

had called upon Communists to infiltrate the armed forces, disintegrate their morale, take over the Army and overthrow the capitalists (R. 104, 116). Since there is no evidence whatsoever in this record as to any policy of the Communist Party advocating any of the above acts, and proof of such advocacy by the Communist Party has not been judicially established *Schneiderman* v. *United States*, 320 U. S. 118 (1943) (see Prettyman J., dissenting opinion in *N. M. U.* v. *Herzog*, (D. C. D. C. Civil Action No. 4874—'47, decided April 13, 1948, unreported)) such evidence does not tend to establish defendant's membership in the Communist Party. Such evidence, however, does tend to establish proof of other separate, independent crimes under the New York Criminal Anarchy Act, the Seditious Conspiracy Act and the Alien Registration Act, 1940. It is uniformly held to be reversible error to admit proof of other separate and independent crimes upon a trial of the crimes charged in the indictment, because of the prejudicial effect of such proof on the jury.[23] Exceptions are permitted where the evidence is admitted to prove a motive or intent, under a statute where intent or motive is an essential element.[24] Even here, however, the jury must be instructed to consider the evidence of such other crimes only upon the issue of intent.[25]. The False Claims Act, however, is a statute in which motive or intent is not an essential element. Its legislative history shows that purpose and intent, which were essential ingredients in the statute prior to 1934, were deliberately and intentionally eliminated by amendment in that year, and the statute now punishes false statements regardless of pur-

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[23] *Boyd* v. *United States* 142 U. S. 454 (1891); *Kempe* v. *United States* 151 F. 2, 680 C. C. A. 8 (1945); *United States* v. *Modern Reed & Rattan Co.* 159 F. 2d 658 C. C. A. 2 (1947), cert. denied 331. U. S. 831.

[24] *Wood* v. *United States* 41 U. S. 341 (1842) *United States* v. *Fawcett*, 115 F. 2d 764 C. C. A. 3 (1940).

[25] *Boyd* v. *United States* 142 U. S. 454 (1891) *Orloff* v. *United States*, 153 F. 2d 292 C. C. A. 6 (1946).

pose or intent.[26] In any event, even if such evidence was admissible on the issue of motive or intent, the trial court failed altogether to instruct the jury as the limited purpose for which it could consider the evidence. That court, having denied defendant's motion to dismiss the first nine counts and having admitted the evidence of such other crimes under the allegations of those counts, was in no position to give such a charge and, in fact, instructed the jury to the contrary. Under the court's ruling as to the first nine counts, defendant was likewise precluded from requesting such a charge.

It is one thing to admit evidence establishing that defendant committed a crime under an allegation of an indictment that he falsely denied having committed the crime; it is quite another matter to sustain the admission of that evidence of the other crime, when the inclusion of allegation in the indictment is held on appeal to have been erroneous and erroneously submitted to the jury, and the evidence is irrelevant to the issues properly on trial.

Under these circumstances, the admission of the evidence in question, which tended to establish that defendant had committed other separate and different crimes under other Federal and State laws from those in the two timely counts for which he was validly on trial under the False Claims Act constituted substantially prejudicial error, warranting reversal and a new trial.

Similar considerations apply to the admission of evidence that defendant had counselled Communist Party members to infiltrate organizations for the purpose of creating Communist front organizations and to sow resentment and discontent among Negroes in order to recruit Party members. In its effect upon the jury, such evidence is so highly

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[26] *United States* v. *Gilliland* 312 U. S. 86, 93-94.

prejudicial to defendant as clearly to fall within the reason for the rule prohibiting proof of other crimes.

C. Defendant's nine statements to the F.B.I. and the Commission in 1942-1943, under the nine barred counts, constituting proof of nine separate crimes, were erroneously admitted. These statements are the same, in Counts I, V, VI, and VIII, similar in Counts II, III, IV, or *arguendo*, consistent in Counts VII and IX, with defendant's statements to Panuch in 1946, admitted under Counts X and XI. But, "Each count of the indictment charges an offense different from the others either from a standpoint of time when the alleged false or fraudulent statements were made or with respect to different governmental agencies." On this ground, the trial court denied defendant's motion to dismiss the indictment as violating the Fifth Amendment by charging the same offense in a multiplicity of counts (*United States* v. *Marzani*, 71 Fed. Supp. 615, 618 (1947)). The court below has brushed aside the plain fact of the separateness of the nine statements charged in the nine barred counts from those charged in the remaining two, by arguing that since the earlier statements were the same or similar to the later statements, and the only issue was the truth or falsity, of the statements, the issue actually submitted to the jury on the trial of the eleven counts was the same as it would have been if only the last two counts had been submitted.

One trouble with this argument is that the statements may have been the same but the crimes were different. If the court below is correct, the trial court should have granted defendant's motion to dismiss the indictment on the constitutional ground of double jeopardy, or have required the prosecution to elect or have appropriately charged the jury, or have sentenced the defendant only on the timely counts. Its failure in these respects would, therefore,

constitute reversible error. *Braverman* v. *United States*, 317 U. S. 49 (1942); *Kotteakos* v. *United States*, 328 U. S. 752 (1946); *Cain* v. *United States*, 19 F. 2d 472, 476 (1927); *Patrilo* v. *United States*, 7 F. 2d 804 (1925).

Another trouble with the argument is that the issue submitted to the jury on the trial of the eleven counts was not the same as the court below thought it would have been on the last two counts. The difference is immediately apparent from the trial court's statement of the issue on eleven counts to the jury and the issue as the court below conceived it, after holding that the first nine counts were barred. The court below held that "The *truth or falsity* of the statements was the only issue" [27] (R. 278). The trial court told the jury "The simple issue here involved is whether or not the defendant *knowingly, wilfully and feloniously made false and fraudulent answers* to the questions asked of him" [28] (R. 43). The actual issue thus submitted to the jury was not merely whether the 1946 statements were true or false, but whether those statements were true or false, *and if false, knowingly, wilfully and feloniously made.* And this is the test under the statute.

Under the trial court's instructions, the jury must necessarily have been heavily influenced in reaching its verdict on the oral, informal and unsworn statements under the last two counts, with respect to the crucial issue of knowledge and wilfulness, by the admission in evidence of the documented, formal and sworn statements under the nine barred counts, particularly in the light of the array of witnesses who were summoned to identify the proof of the nine earlier statements. It is conceivable, indeed probable, that with the evidence of the 1942-1943 statements before it, the jury concluded that appellant, having lied on

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[27] Italics supplied.

[28] Italics supplied.

previous occasions under oath, was a chronic and consistent liar on this very subject, and, therefore, *knowingly* and *wilfully* lied in his unsworn statements to Panuch in 1946. The question is not whether the jury was right in its judgment regardless of the error in the admission of the 1942-43 statements, or their effect upon the verdict, but rather what effect the error had, or may reasonably be taken to have had, upon the jury's decision, the test being the impact of the error on the minds not of the appellate judge but of the jurors in the total setting. *Kotteakos* v. *United States, supra.* That the admission of the earlier statements constituted prejudicial error is not logically excluded by the argument that "if (the statements) were false in 1946 they were false in 1942, and vice versa" upon which the court below rested its holding that the admission of the 1942-43 statements were not prejudicial to appellant. For the jury could reasonably have found that the statements in the last two counts, had the trial been limited to those two counts, were false, but not knowingly and wilfully made, in the light of the informal nature of the conference in which they took place, whereas, on the trial of the eleven counts, it may reasonably have concluded that since appellant had lied under oath nine times before, he knowingly and wilfully lied twice afterwards, in his unsworn discussions with Panuch. In the total setting of the trial of eleven counts, this may reasonably be taken to have led the jury to a verdict of guilty on all counts, whereas, had the trial been on the last two counts alone, there is a reasonable possibility that the verdict would have been otherwise. The difference is between (1) the logical necessity which the Court assumes from the fact that the 1946 statements were the same or substantially similar to those made in 1942-43, the proof of the falsity of both sets of statements being the same, and (2) the impact on the minds of the jury of the prior sworn and formal statements when it came to its

deliberations as to the later informal and unsworn statements.

The resulting prejudice arose not merely because of the effect of the earlier statements on the trial of the statements under the last two counts on the issue of knowledge and wilfulness but also because the earlier statements themselves constituted an indispensable part of the proof of nine separate other crimes under the same statute for which defendant was not validly on trial. For reasons indicated above, proof of such other crimes is not admissible under the False Claims Act, or, if admissible, requires instructions to the jury as to the purpose for which such evidence may be considered. Here, the appropriate instructions were not and, under the trial court's erroneous ruling, could not have been given. Instead, the trial court instructed the jury to consider all the evidence on all counts, including defendant's statements in the barred counts, which went to establish that defendant was not only a chronic and consistent liar, but a criminal liar as well. Under these circumstances to hold, as did the court below, that the admission of the nine statements under the barred counts was beneficial rather than prejudicial to defendant in a trial which should have been limited to the remaining two counts is to ignore the fact that the admission of those statements may have decisively and prejudicially affected the verdict on the last two counts.

D. Defendant was erroneously sentenced. The court below upheld the general sentence of one to three years' imprisonment imposed by the trial court on the jury's separate verdict as to each of the eleven counts of the indictment, on the ground of the rule in *Claasen's* case, that in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence

on the good count only [29] (R. 281). The record here, however, shows that the trial court thought that each of the eleven counts charged a separate, distinct and valid offense. The trial court, therefore, must necessarily have imposed its general sentence on the basis of eleven separate convictions, as found by the jury, not on the basis of the only two which could validly have been found. In *Claasen's* case, the court mentions the fact that "the record does not show that any of the instructions at the trial were excepted to." Here, the record shows that defendant moved to dismiss the first nine counts of the indictment before, during and after trial (R. 20, 31, 46), and that the trial court's denial of the motion was error. Under these circumstances, the rule in *Claasen's* case is not applicable. *Dwyer* v. *United States,* 170 Fed. 160, 166, C. C. A. 9 (1909). On the record, it cannot be determined what part of the sentence is attributable to the verdict on the barred counts, the remaining two counts, or any of the counts separately. It cannot, however, be fairly assumed that the trial court would have imposed the same penalty for two violations of the applicable statute as for eleven separate violations which included those two. The rule in *Claasen's* case was designed to avoid a miscarriage of justice. Its arbitrary application in this case succeeds only in achieving the opposite result.

The trial court's error in denying the motion to dismiss the first nine counts of the indictment permeated the entire trial. It permitted the jury to find defendant guilty of nine separate violations of the False Claims Act for which he was not validly on trial; to consider irrelevant and prejudicial evidence, including proof of other violations of other State and Federal laws and prejudicial matter, in the nature of crimes, which were not validly included in the indictment; and to conclude, on the basis of evidence which should not

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[29] *Claasen* v. *United States* 142 U. S. 146 (1891).

have been admitted, that defendant had knowingly and wilfully made false statements when, had the error not been made, the jury might have well found otherwise. It prevented the defendant from objecting to irrelevant evidence and from requesting precautionary instructions. It led the judge to misdirect the jury and to impose a sentence on counts which were not properly on trial.

In the total setting of this case, these errors cannot be dismissed as harmless. The evidence against defendant is not so strong or overwhelming that any reasonable jury, had there been no error, could not have reached a different verdict. Of the three chief witnesses for the prosecution, one was a self-confessed perjuror (R. 117-120, 129-139), the second a former member of the Communist Party, whose testimony was in conflict in material respects (R. 70, 71, 78, 127-128) with that of the third witness, a police spy and *agent provocateur* (R. 88-89), whose testimony is subject to serious reservations as to its reliability, cf. *Colyer* v. *Skeffington*, 265 Fed. 17, 69 (D. C. Mass. (1920)). Defendant did not admit his guilt but took the stand to deny it vigorously in every material respect. Under these circumstances, we submit, the permeating error of the trial court substantially and prejudicially affected the verdict. *Kotteakos* v. *United States, supra.*

3. *Defendant was denied due process and a fair trial by the trial court's failure to treat the predominantly Negro jury as a representative jury.*

We have earlier summarized the evidence in support of our contention, overruled by the court below, that the trial court excluded relevant, competent, material and important evidence, involving Negroes and Negro organizations, solely because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence on the same

terms as any other representative jury. It is clear that the application of such a test violates defendant's rights under the First and Sixth Amendments to the Constitution. For some seventy years, this Court has held in a variety of circumstances that the systematic exclusion of Negroes from grand and petit juries solely on the ground of race or color constitutes a denial of constitutional rights to the defendant. *Patton* v. *Mississippi*, 332 U. S. 463 (1947). For similar reasons, this Court condemned the systematic exclusion of wage earners (*Thiel* v. *Southern P. Co.*, 328 U. S. 217 (1946)) and women (*Ballard* v. *United States*, 329 U. S. 187 (1946)) from jury lists. It follows inescapably, we think, from this Court's insistence that the constitutional guarantee requires the selection of a "representative" jury, without exclusion because of race, color, economic status or sex, that, once properly selected, the jury must be treated throughout the trial as a representative jury.

In this case, the trial court failed so to do. To the extent that the limitations which it imposed upon the admissibility of evidence are not justified by the ordinary rules of evidence, they are erroneous without regard to the motives of the trial court. Such limitations were imposed on defendant's direct examination with respect to the incident involving police brutality against Negroes, and, in part, upon the cross examination of the chief prosecution witness, Drew, which was aimed at impeaching his credibility by exploring his activities, testified to on direct, as a police spy and *agent provocateur* in the National Negro Congress. *Alford* v. *United States*, 282 U. S. 687, 694 (1931); *Simon* v. *United States*, 123 F. 2d 80, 85, C. C. A. 4 (1932), cert. denied 314 U. S. 694; *Lindsey* v. *United States*, 77 App. D. C. 1, 133 F. 2d 368 (1942). To the extent that the limitation of Drew's testimony was subject to the trial court's

discretion, the race and color of this particular jury was an improper basis for the exercise of that discretion. *Hurtado* v. *California*, 110 U. S. 516, 555 (1884). The Constitution does not sanction a distinction among jurors on the basis of race or color. We submit that the trial court's failure to treat the jury as a representative jury is contrary to the public policy of the United States and as such should be corrected by this Court in the exercise of its supervisory powers over the Courts of the District of Columbia. *Hurd* v. *Hodge*, — U. S. — decided May 3, 1948.[30]

Conclusion

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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[30] See "To Secure These Rights", Report of the President's Committee on Civil Rights (1947) pp. 87-95.

APPENDIX

Criminal Code—

Sec. 6. *Seditious Conspiracy.* If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States, contrary to the authority thereof, they shall each be fined not more than $5,000 or imprisoned not more than six years, or both (U. S. C. Title 18, Sec. 6).

Sec. 35 (A). *Presenting false claims.* Whoever shall make or cause to be made or present or cause to be presented for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both (U. S. C. Title 18, Sec. 80).

Alien Registration Act, 1940—

Sec. 9 (A). It shall be unlawful for any person, with intent to interfere with, impair or influence the loyalty

morale or discipline of the Military or Naval forces of the United States.

(1) To advise, counsel, urge or in any manner cause insubordination, disloyalty, mutiny or refusal of duty by any member of the Military or Naval forces of the United States. . . .

Sec. 10. (A). It shall be unlawful for any person (1) to knowingly and wilfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence or by the assassination of any officer of any such government. . . . (U. S. C. Title 18, Secs. 9-10).

Judicial Code—

Sec. 269, Amended. . . . On the hearing of any appeal, certiorari, unit of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties (U. S. C. Title 28, Sec. 391).

New York Anarchy Act—

Sec. 160. *Criminal Anarchy defined.* Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of the government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

Sec. 161. *Advocacy of Criminal Anarchy.* Any person who:

(1) By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence or by assassination of the head or of any of the executive officials of government or by any unlawful means; or

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(4) Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

Sec. 162. *Assemblages of Anarchists.* Whenever two or more persons assemble for the purpose of advocating the doctrines of criminal anarchy, as defined in Section one hundred and sixty, such an assembly is unlawful and every person voluntarily participating therein by his presence, aid or instigation, is guilty of a felony . . . (New York Penal Law, Sec. 160-162).